No. 8115

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHICAGO, MILWAUKEE, ST. PAUL and PACIFIC RAILROAD COMPANY,

Appellant,

vs.

CLIFFORD GILBERT,

Appellee.

Reply Brief of Appellant

MURPHY & WHITLOCK,
J. C. GARLINGTON,
R. F. GAINES.
Missoula, Montana.

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REPLY BRIEF OF APPELLANT.

On September 26 we received from counsel for appellee two briefs, one discussing our specifications of error occurring at the trial and the other dealing generally with the question of liability of the defendant on the merits. We will make very brief reply to them in the order given.

ERRORS AT THE TRIAL.

1. EXPECTANCY OF LIFE. The plaintiff confuses our position on this point. We do not contend that proper mortality tables and proof of expectancy of life are incompetent evidence in any case. Here, however, plaintiff introduced *no evidence whatever* as to mortality tables and expectancy of life, but requested the court to make up his evidentiary deficiency by judicial fiat. It is obvious that the cases cited do not meet or even mention such an irregularity.

2. EVIDENCE OF LOSS OF EARNING CAPACITY. The sum total of plaintiff's argument is that the evidence shows him to have been employed once as a mechanic, to have been employed as a truck driver when injured, and now not to be as able a mechanic as before. We do not deny that there is evidence to this effect. There is no evidence, however, of what wages plaintiff had ever earned or was earning as a truck driver. In substance, therefore, while plaintiff may have proved his "disability to pursue his usual vocation," he has in no way proved that his earning *capacity* is diminished. This is the precise distinction made in the case of

Robinson v. Woolworth Co.,
80 Mont. 431, 261 Pac. 253.

cited in our brief at page 55, and sought to be distinguished by plaintiff.

Plaintiff admits in his pleading that he is an experienced truck driver. Apparently his earning capacity in this field is undiminished by the injury. There is no proof of what his earning capacity in this acknowledged field was or now is. How, therefore, can the Court or the jury *assume* that this *must* be less than his earning capacity as a mechanic and allow him damages for the loss?

The plaintiff has adroitly selected one or two elements from our argument on this point for seeming reply in full, but his effort falls short.

3. FORESEEABILITY AND PROXIMATE CAUSE. The only authority cited by plaintiff against our position on this point is

> Heckaman v. Northern Pacific Railway Company 93 Mont. 363, 20 Pac. (2d) 258.

That was a flood damage case, based on the inadequacy of a drain in the railroad right of way, where it crossed a stream to carry off unprecedented cloudburst surface waters. The state of the pleadings and evidence in that case are so different from the instant case that no helpful analogy may be drawn.

The point we are urging is that since the plaintiff adopted the particular theory of disintegration by centrifugal force, and alleged negligence of the defendant in that particular, he cannot support such a theory by proving that defendant should have foreseen possible injury by reason of the condition of some other utterly unrelated part of the truck. We do not say that to be held

liable defendant must have foreseen the particular event that occurred, but we do certainly say that to be held liable defendant must have foreseen some injury to some one from the disintegration of the fan due to the conditions alleged by plaintiff.

4. PRESUMPTION OF NO DEFECT. Plaintiff's answer to our contention does not face the facts. There was a great conflict of evidence as to the alleged defective conditions of the fan and fan assembly. Against the bare testimony of plaintiff and his father, we produced the physical exhibits, together with uncontradicted proof of identical conditions. The exhibits show conclusively no evidence of wobbling, etc. as claimed by plaintiff. Therefore, the presumption of law was most important in the solution of this conflict by the jury, if the case is a proper case for the jury.

It will not do for plaintiff to say there was no conflict as to whether the motor heated and the truck wouldn't start easily and hence that there was no room for presumption. Such defects as those have no part in plaintiff's own theory of his case, and therefore are no reason why the requested charge should not have been given.

BRIEF SUBMITTED AT THE TIME OF ARGUMENT.

1. The caustic comment of plaintiff in closing his brief on the errors at the trial about "tedious citations" in an attempt to display false erudition rather comes home to roost on his supplemental brief on the merits. We have no complaint to make over many of the generalizations he has made as to legal principles of the law of negligence, procedure and practice, although we do not see

how they will assist the Court in solving the questions in this case.

There is only one point which deserves brief reply. In the first portion of his brief, he answers our argument of inherent impossibility by referring to the possibility of a ricochet. The evidence on this will not sustain a judgment. Plaintiff's expert witness did not even testify that a ricochet was possible. Our witness O'Neill was asked about it on cross-examination and said:

> "One piece *might* hit another piece and drive it out of the housing or enclosing case." (Tr. 192).

Continuing, however, he said:

> " . . . It is my opinion that a part of the fan could not be thrown out between the cross members on the radiator shell and strike the fingers of the driver of the truck who had his thumb and first and second fingers on the pet-cock. Of course, nothing is impossible, but it does not seem likely that this could happen." (Tr. 188).

Our witness Shue testified:

> "(If the pieces) should strike something it is possible that they would be ricocheted and deflected from a straight line. There are a number of places within the interior of the shell of the radiator where the tubes are bent as if they had been struck by some object." (Tr. 207).

Continuing, he said:

> "If the fan should fly apart by centrifugal force and the pieces should strike against each other and thus be changed from their plane of flight, I do not believe that the pieces in rebounding could exert a very great force at a position close to the axle of the fan." (Tr. 210).

Referring to the marks of bent tubes, these could have been as consistently, and certainly more probably, caused

by the binding of some broken pieces of the fan within the radiator resulting from the destruction of the vanes. (Tr. 198).

This is all the evidence on the ricochet feature. We know of no Court or case which has held that a judgment for a plaintiff in a case of this kind may be sustained by evidence consisting of one "might," later negatived, plus one "possible," which refers only to a possible "deflection" rather than the reversal of direction which plaintiff must prove.

2. ASSUMPTION OF RISK: At the oral argument we called attention of the Court to the case of

Matson v. Hines,
63 Mont. 214, 207 Pac. 474.

This case interprets Section 6607, Revised Codes of Montana, 1935, so as to make the defense of assumption of risk fully available in a case such as this. The Court held:

> "As a matter of law, in this state, an employee of a railroad company operating a railroad is deemed not to have assumed the risk incident to his employment, when such risk arises by reason of the negligence of his employer, or of any person in the service of such employer, (See 6607, Revised Codes 1921). However, the defense of assumption of risk may be interposed as a bar in an action for personal injuries of an employee, when such injuries have been caused by hazard which is incident to the particular business. When they have resulted from a hazard brought about by a failure of the employer to exercise the degree of care required of him by law to perform his primary duty to provide a reasonably safe place of work and reasonably safe appliances for the work, the defense is also available, provided the employee is aware of the condition of

increased hazard thus brought about, or it is so obvious that an ordinarily prudent person, under the same circumstances, would have observed and appreciated it.''

With these comments, the case is

Respectfully submitted,

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